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THE ROLE OF THE COURTS IN PROVIDING LEGAL SERVICES: A PROPOSAL TO PROVIDE LEGAL ACCESS FOR THE POOR

TALBOT D'ALEMBERTE*

In a legal system as complex as America's, representation by counsel is often necessary for an individual to fully enjoy the right of access to the courts. Yet the high cost of legal representation, necessary for the protection of legal rights and for the just administration of the legal system, often places such representation beyond the reach of the poor. In this Introduction and the Petition that follows, Talbot (Sandy) D'Alemberte outlines the basis of the right to access to the judicial system and suggests a procedure by which this right can be effectively realized.

IN *Mallard v. United States District Court for the Southern District of Iowa*,¹ the United States Supreme Court held that, under the terms of a federal statute,² a lawyer could not be compelled by a court to represent an indigent litigant.³ This decision comes at a time when lawyers are debating the very meaning of "professionalism"⁴ and at a time of widespread concern over how the poor will be provided access to the courts.⁵

The *Mallard* case deserves to be debated in this context. The majority opinion explicitly emphasizes that its holding is limited to the issue of statutory construction.⁶ The majority does not address a court's

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1. 109 S. Ct. 1814 (1989).

2. 28 U.S.C. § 1915(d) (1982) ("The court may *request* an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.") (emphasis added).

3. *Mallard*, 109 S. Ct. at 1816.

4. See, e.g., Gering, *Professionalism: Law Firms Adopt Credo*, A.B.A.J., Jan. 1989, at 56; Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307 (1988).

5. See, e.g., Klien, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Nelson, *Quality Control for Indigent Defense Contracts*, 76 CALIF. L. REV. 1147 (1988); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231 (1988) [hereinafter *Fee Simple*]; Note, *Legal Education for the Pro Se Litigant: A Step Towards a More Meaningful Right to Be Heard*, 96 YALE L.J. 1641 (1987) [hereinafter *Legal Education*].

6. *Mallard*, 109 S. Ct. at 1822. The Court held that the use of the word "request" in 28 U.S.C. § 1915(d) signified that the provision was not intended to "authorize coercive appointments of counsel." *Mallard*, 109 S. Ct. at 1822.

inherent power to order an attorney's service and, although the majority opinion touches on lawyers' "ethical obligation to volunteer their time and skills *pro bono publico*,"⁷ it provides no guidance as to how this obligation is to be enforced.

Justice Stevens' dissent (joined by Justices Marshall, Blackmun and O'Connor) disagrees with the majority's reliance on the narrow issue of statutory construction and relies instead on the broader issue of the traditional relationship between courts and lawyers:

The relationship between a court and the members of its bar is not defined by statute alone. The duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments.⁸

The above reference to "rules of court" is of particular interest. The Petition⁹ which follows suggests that the courts, through their court rules, should become very directly involved in solving the problem of legal services to the poor.¹⁰

This brief Introduction relates to the proposal set forth in the Petition that follows, which focuses on the role of state rather than federal courts and suggests a role for Florida courts in providing for legal services to the poor through a Rule of Judicial Administration, a rule grounded on an ancient statute¹¹ as well as on the tradition of the bar to serve the poor.¹²

7. *Mallard*, 109 S. Ct. at 1823.

8. *Id.* (Stevens, J., dissenting).

9. Petition for Provision of Legal Services to the Poor (Amendment to the Rules Regulating the Florida Bar and the Rules of Judicial Administration), No. 74,538, filed in The Supreme Court of Florida, Aug. 8, 1989. Except for insubstantial changes in typeface, format and spelling, the petition herein appears as filed with the court.

10. A court rule requiring lawyers' services in criminal cases was tangentially before the United States Supreme Court last term in *Barnard v. Thorsteen*, 109 S. Ct. 1294 (1989), in which the Court held that the Virgin Islands could not exclude nonresidents from membership in the bar. There, the Court addressed the argument that a reason for excluding nonresidents was that they could not comply with a court rule requiring that all members of the bar be available to represent indigent criminal defendants. The Supreme Court accepted this rule but did not see it as a barrier:

As respondents point out, if handling indigent criminal cases is a requirement of admission to the Bar, a nonresident knows that he must either appear himself or arrange with a resident lawyer to handle the case when he is unavailable. If the nonresident fails to make all arrangements necessary to protect the rights of the defendant, the District Court may take appropriate action. This possibility does not, however, justify a blanket exclusion of nonresidents.

Id. at 1302.

11. Statutes of Henry VII, 1495, 11 Hen. 7, ch. 12 (repealed 1883, 46 & 47 Vict. ch. 49).

12. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980).

Florida is a particularly appropriate jurisdiction for such a proposal. The Florida Supreme Court has accepted "responsibility to promote the full availability of legal services"¹³ and has taken many steps toward achieving this goal. For example, the Florida Supreme Court pioneered the imaginative Interest on Trust Accounts (IOTA) program to recapture interest from funds held in trust for clients by lawyers.¹⁴ Likewise, the Florida Bar has made efforts to ensure all citizens access to the courts.¹⁵ The present arrangements for providing legal services to the indigent, however, are far from adequate. Indeed, Justice Brennan's majority opinion in *Mallard* recognizes this problem, stating that this is "a time when need for legal services among the poor is growing and public funding for more services has not kept pace."¹⁶

Like other lawyers concerned about the course the profession is taking and the duty of lawyers to deal with the problems of the poor, I have watched with dismay as federal funds for legal services have been held to an obviously inadequate level¹⁷ and the very administration of the legal services program has sought to dismantle the program.¹⁸

Hope for improved legal services to the poor has come from the continued dedication of lawyers working in legal aid and public service programs, from the continued voluntary *pro bono* efforts of the bar, and from the imaginative IOTA program introduced into the United States by Arthur England, Jr.,¹⁹ then a member of the Florida Supreme Court.

Despite the development and expansion of these IOTA programs nationwide,²⁰ the need for legal services—for access to justice—remains a severe problem. The American Bar Association (ABA), under the leadership of President Bob Raven and Brooksley Born, Chair of the ABA Consortium on Legal Services and the Public, held a conference on "Access to Justice in the 1990's" at Tulane Law School in the

13. *Florida Bar v. Furman*, 376 So. 2d 378, 382 (Fla. 1979).

14. See *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978) (approving IOTA program); *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981) (implementing IOTA program); *In re Interest on Trust Accounts*, 538 So. 2d 448 (Fla. 1989) (making IOTA program mandatory). See generally Hearing, *Funding Legal Services for the Poor: Florida's IOTA Program--Now Is the Time to Make It Mandatory*, 16 FLA. ST. U.L. REV. 337 (1988).

15. See *Furman*, 376 So. 2d at 382 ("Devising means for providing effective legal services to the indigent and poor is a continuing problem. The Florida Bar has addressed this subject with some success.").

16. *Mallard*, 109 S. Ct. at 1823.

17. See *Fee Simple*, *supra* note 5, at 1238 n.50 (1988).

18. See *Legal Education*, *supra* note 5, at 1648-49 n.50 (1987).

19. See Hearing, *supra* note 14, at 342 (citing Feder, *Four Win Pro Bono Awards*, A.B.A.J., Sept. 1988, at 124, 125).

20. See *id.* at 337-38.

Spring of 1989. That conference featured a number of fine speakers and offered opportunities for lawyers concerned with legal access to discuss methods by which access can be improved.

One of the more provocative speakers was Justice Earl Johnson,²¹ who presented the case for access through a comparative law approach. He argued convincingly that legal access in the United States lags far behind that accorded the citizens of most European countries. Justice Johnson's speech led me to reread an article²² in which he discusses, *inter alia*, a statute dating back to Henry VII²³ which provided for legal assistance to the poor through court appointment.

Justice Johnson points out that this statute, first enacted in 1495, is today the law of California because California's first Legislature adopted the common law of England as it was in force at that time.²⁴ My research has convinced me that this statute is in force in Florida as well and is essential to the proposal embodied in the Petition below.

The essence of this proposal is that the problem of providing legal services to the poor will be solved only if lawyers and judges determine to solve it together. Fortunately, we are in a position to develop a solution. The bar and the courts are supportive of improved access to the courts. It is time for a bold approach to the problem. A resolute bench and obliging bar will ensure that the legal profession fulfills its special mission to provide access to justice for all citizens. To that end, this Petition is being presented to the Florida Supreme Court.²⁵

21. Associate Justice, Second District Court of Appeal of California.

22. Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loy. L.A.L. REV. 341 (1985).

23. Statutes of Henry VII, 1495, 11 Hen. 7, ch. 7 (repealed 1883, 46 & 47 Vict. ch. 49).

24. Johnson, *supra* note 22, at 349. Justice Johnson cites CAL. CIV. CODE § 22.2 (West 1982), which states: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State is the rule of decision in all the courts of this State." Johnson, *supra* note 22, at 349 n.35. This provision "previously . . . was found in § 4468 of the now defunct Political Code which was first enacted in 1850." Johnson, *supra* note 22, at 349 n.35. In *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917), the Supreme Court of California held that this provision granted to indigent citizens the same rights that "indigent English litigants enjoyed under the common law of England as it existed when California became a state in 1850." Johnson, *supra* note 22, at 349.

25. This petition has benefitted from many comments and suggestions, especially those from Randy Berg, Arthur England, Jr., Steve Goldstein, Don Middlebrooks, Allen Sundberg, John Yetter, Jim Earl and Julio Pestonit.

IN THE SUPREME COURT OF FLORIDA

NO. 74,538

PETITION FOR PROVISION OF LEGAL AID TO THE
POOR (AMENDMENT TO THE RULES REGULATING
THE FLORIDA BAR AND THE RULES OF JUDICIAL
ADMINISTRATION)PETITION FOR RULE ESTABLISHING LOCAL
PROCEDURE TO MEET LEGAL NEEDS†

I. JURISDICTION

Jurisdiction is derived from Rule 1-12 of the Rules Regulating The Florida Bar and Rule 2.130(b) of the Rules of Judicial Administration.¹

II. SUMMARY

This Petition seeks rules which provide a procedure for local plans to assure access to justice.

The Court has accepted the "responsibility to promote the full availability of legal services,"² and has taken many steps toward achieving full availability. Likewise, the Florida Bar has made efforts to see that all citizens have access to justice.

The right to counsel is a necessity for persons living in our complex society, and, moreover, it is a right which has been a part of our law since Florida became a state and adopted an English statute in existence since 1495.

This Petition is built on the assumption that lawyers are public spirited, that law is a public profession and that the bar has a special mission to assure justice for all.

However, this Petition does not propose compulsory public service. The proposed rules recognize the traditional power of court appointment, but they do not contemplate that the appointment power need ever be used to coerce lawyers who have principled objections to par-

† This Petition was filed in the Supreme Court of Florida on August 8, 1989. The Petition herein appears as filed with the court, with the exception of insubstantial changes in typeface, format, and spelling.

1. The Petitioners have contacted the President of the Florida Bar and the Chairman of the Rules of Judicial Administration Committee. See certificate of service, consultation and request for hearing at the end of this Petition (omitted).

2. *Florida Bar v. Furman*, 376 So.2d 378, at 382 (Fla. 1979).

ticular representation. The rules already protect lawyers against the representation of clients repugnant to them, and common sense dictates that the unwilling lawyer should not be appointed.

This petition relies on a statute adopted during the reign of Henry VII, on Rule 4-6.2 of the Rules Regulating The Florida Bar, and on express rights and powers granted by the Constitution for Florida: the constitutional Right of Access to the Courts (Art. I, § 21), Equal Protection (Art. I, § 2), Due Process (Art. I, § 9), the Court's power to adopt rules (Art. V, § 2), and the Court's power over the legal profession (Art. V, § 15).

The rules proposed in this Petition provide a modern procedure to implement an ancient right.

III. THE LEGAL BASIS FOR THE PROPOSED RULE

A. The Court Has Taken a Leadership Role in Providing Legal Services to the Poor, and, Where Appropriate, Has Relied on the Historic Duty of Counsel to Accept Appointments.

In modern society, legal rights are effectively conferred only when attorneys are available. This court has recognized that availability of lawyers for the poor is a major problem.

In 1979, this Court addressed the case of Rosemary Furman, who was charged with unauthorized practice of the law, *Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979). In that case, the court was presented with a referee's report which recommended that Furman be found guilty of contempt of court and enjoined from the unlicensed practice of law. The Court agreed and paused to address a recommendation that the court "require the bar to conduct a study to determine how to provide effective legal services to the indigent." This court accepted that recommendation and ordered a separate inquiry into this issue.

The Court squarely faced the essential question of the Court's role in assuring access to justice when it stated:

Without question, it is our responsibility to promote the full availability of legal services.

376 So.2d at 382.

The Court then instructed The Florida Bar:

Devising means for providing legal services to the indigent and poor is a continuing problem. The Florida Bar has addressed the subject with some success. In spite of the laudable efforts by the bar,

however, the record suggests that even more attention needs to be given to this subject.

Therefore, we direct the Florida Bar to begin immediately a study to determine better ways and means of providing legal services to the indigent. We further direct that a report on the findings and conclusions from this study be proposed and filed with this court on or before January 1, 1980, at which time we will examine the problem and consider a solution.

376 So.2d at 382.

In the decade since *Furman*, the bar and this Court have taken further steps³ directed at the provision of legal services to the poor, but access to justice remains a major problem for Florida.

In 1980, a report entitled "The Legal Needs of the Poor and Under-represented Citizens of Florida: An Overview" was submitted to The Florida Bar. It recounts with detail the need for legal services to all citizens. It also makes extensive suggestions to the bar on ways to provide for these needs.

In June 1985, the bar issued a report entitled "Recommendation of the Special Commission on Access to the Legal System." It reiterates the dire need for legal aid to the poor, and also lists a series of recommendations to attack the problem.⁴

3. The Court has reviewed its rules in an effort to simplify court procedure, has allowed non-lawyers to assist in the completion of legal forms (Rule 10-1.1(b), Rules Regulating The Florida Bar) and has established a program to recognize and encourage *pro bono* work by Florida lawyers. Special rules recognize the importance of legal services programs: In the Rules Regulating The Florida Bar, Chapter 11 provides for law student intern programs; Chapter 12 authorizes the "emeritus attorney" to participate in the delivery of legal services; and Chapter 13 allows for legal aid practitioners.

Most significant has been the development of the "IOTA" program which provides very real support for legal services. See *Matter of Interest on Trust Accounts: A Petition to Amend the Rules of the Florida Bar*, 538 So.2d 448 (Fla. 1989).

4. One of these recommendations was for the requirement for mandatory *pro bono* service by lawyers, a subject addressed in the 1983 case styled *In re Emergency Delivery of Legal Services to the Poor*, 430 So.2d 39 (Fla. 1983), in which petitioners urged the Court to adopt rules to impose mandatory *pro bono*. The Court rejected that petition.

Those who oppose mandatory *pro bono* do not quarrel with the result. Critically, however, the rationale for the opinion is somewhat broad. The Court's opinion refers to the reluctance "to coerce involuntary servitude in all walks of life; we do not forcibly take property without just compensation; we do not mandate acts of charity." 432 So.2d at 41.

This Petition does not support the concept of lawyers being forced into involuntary servitude or mandated charity. Clearly, at some level, there could be an intolerable burden on lawyers. As we demonstrate later, the Rules Regulating The Florida Bar already protect against the imposition of such a burden.

The difficulty with the argument is that there is no evidence that lawyers are overburdened with public service, or that some requirement of public service, where there is demonstrated necessity, would be unduly burdensome. In fact, the burden now taken by the bar may be considerably less in the years since society undertook to pay for indigent criminal defense.

The Florida Supreme Court has recognized that "[t]here are people in need of legal services who are unable to pay for those services," and observed that "the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals," *In re Emergency Delivery of Legal Service to the Poor*, 432 So.2d 39, at 41, citing EC 2-25, Code of Professional Responsibility. The Court is undoubtedly correct. The generous spirit of lawyers is a vast resource which can be harnessed.⁵

If lawyers are convinced that there are needs in their communities and the courts ask them to accept appointments, it is unlikely that lawyers will regard this as involuntary servitude. If in a given community the needs are too great and the burden intolerable, lawyers are creative enough to develop solutions. The Court has a power to lead lawyers and society. When great principles are at stake and there are legal needs to be fulfilled, the Court should exercise that authority.⁶

Mandatory *pro bono*, rejected by the Court in 1983, is subject to a number of objections, including the problem of defining the legitimate areas where service will be recognized (bar associations? community service clubs? church services?) and the problem of the enforcement mechanism which is already overburdened. Moreover, the idea of a procedure to enforce *pro bono* seems a contradiction in terms.

The ancient procedure of court appointment is not subject to those objections. The procedure of court appointment eliminates the problem of enforcement and allows the court to define the area of service and select lawyers. Lawyers do not have the antagonism to the courts that they have to a grievance mechanism.

The Court stated the proper course of action in its 1980 decision, *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980). In that case, the Court dealt with the problem of providing counsel in juvenile proceedings. The Court did *not* accord to all litigants a right of counsel in all pro-

5. A number of voluntary legal organizations have imposed obligations of service on their members. Particularly noteworthy are the pioneering efforts of the Tallahassee Bar Association and the Orange County Bar Association. Others include the Palm Beach Bar Association and the Florida Academy of Trial Lawyers which have adopted rules requiring *pro bono* service of their members.

6. One useful analogy is the role played by the state and federal courts in obtaining representation for death row inmates in post-conviction proceedings. It was only after the courts put strong pressure on the leaders of the bar and large law firms to represent death row inmates that the bar leaders understood the problems of this type of case. With that understanding came the political will to provide a remedy. The Florida Legislature was convinced that it should create and fund the office of Capital Collateral Representative (CCR). If the courts had not led the bar into contact with this area of the law, it is questionable whether the CCR would now exist.

ceedings, but it recognized that counsel should be provided where proceedings can result in permanent loss of parental custody, 385 So.2d at 87, and that counsel would be provided where certain factors dictate. The Court used a case-by-case method which is sensitive to the realities and ideals of due process. Under the court's test, the more complex the case and the more at risk, the more likely that there is a need for counsel. In determining whether there is need to appoint counsel, trial courts should consider other factors such as whether the facts are uncontested or not, whether witnesses must be called, or whether documents must be introduced.⁷

In Interest of D.B. deserves further attention because of its approach to the provision of counsel. Justice Overton, writing for a unanimous court, stated:

Where the trial judge finds no constitutional right to counsel . . . he may nonetheless use his historical authority to provide legal assistance.

385 So.2d at 91.

The Court developed this theme explaining its use of the "historic authority to provide legal assistance" in this passage:

The principal question that arises from the advent of a fundamental constitutional right to counsel in various classes of cases, which effectively began in 1963 with *Gideon v. Wainwright*, is whether the members of the bar should now be relieved of their historical responsibility to represent the poor whenever the constitution mandates the right to counsel in a legal proceeding. In establishing a constitutional right to counsel in certain cases, the United States Supreme Court placed the obligation to provide counsel on the government rather than on individual members of the legal profession.

305 So.2d at 91, 92.

Justice Overton noted that the "common law obligation of the profession to represent the poor" had been carried on in modern practice and referred to "the historic concept that one who is allowed the privilege to practice law accepts a professional obligation to defend the poor," 385 So.2d at 92.

In Interest of D.B. spells out a payment procedure for attorneys called on, as required by the constitution, to represent clients in de-

7. These factors, drawn from *Potvin v. Keller*, 313 So.2d 703 (Fla. 1975), also include the potential duration of child-parent separation, the degree of restriction on visitation, and the presence or absence of parental consent.

pendency hearings. The payment is made by the county government and under a formula which provides for overhead and reasonable income to the appointed attorneys.

The Court goes on to contemplate a situation where the constitution does not require counsel, but where the trial judge deems it necessary to appoint counsel in order to ensure the fairness and integrity of the justice system. The Court stated:

When appointment of counsel is desirable but not constitutionally required, the judge should use all available legal aid services, and when their services are not available, he should request private counsel to provide the necessary services. Under these circumstances no compensation is available, and *the services are part of the lawyer's historical professional responsibility to represent the poor.*

385 So.2d at 92 (emphasis added).

The approach of *In Interest of D.B.* is appropriate for other areas of the civil law. It uses appointed counsel only as a last resort, recognizing that, when they are needed to provide justice, lawyers have responded, recognizing their historic duty to provide their services.

The Rules Regulating The Florida Bar take a similar approach. Although much recent attention has been given to the language of Rule 4-6 entitled "Public Service," most of this has been directed at Rule 4-6.1 which addresses "*Pro Bono* Public Service." Those who favor mandatory *pro bono* have pointed tellingly to the lapse in the language of the Rules and the fact that most sections of the code are phrased with the mandatory "shall," leaving the precatory word "should" to apply only when the issue of *pro bono* public service is addressed. This is correct, but it ignores the second section of the Public Service Rules, Rule 4-6.2 entitled "Accepting Assignments" which states:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) Representing the client is likely to result in violation of the Rules of Professional Responsibility or law; or
- (b) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

The Court has considered the obligations of the profession and has recognized the needs of the poor. What is now needed is some method of connecting these two in an effective way.

In *Furman*, the Court properly analyzed the problem of legal services to the poor as one which can be solved only if the bar and the Court work together. In the *In Interest of D.B.* decision, the Court wedded the duty of the courts to protect the rights of indigents to the historic duty of the bar to represent the poor.⁸ These opinions are faithful to an honorable and ancient role of the courts.

B. Florida's Common Law Authorizes the Courts to Provide Legal Services to the Poor.

The law of Florida did not suddenly spring full grown—it was built on the statute and common law of England. Indeed, English law is the very foundation of our law. Section 2.01, Florida Statutes, states:

The common and statute laws of England which are of a general and not a local nature, with the exceptions hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

One of the English statutes adopted as part of the law of Florida was a statute of Henry VII dealing with legal services to the poor. Translated into modern English, this 1495 statute states:

That every poor person . . . which . . . shall have cause of action . . . against any person . . . within this realm shall have by the discretion of the Chancellor of this realm . . . writ or writs original and writs of subpoena . . . therefore nothing paying to your highness for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued; and that the said chancellor . . . shall assign such of the clerks which shall do and use the making and writing of the same writs, to write the same ready to be sealed, and also learned Counsel and Attorneys for the same, without any reward taken therefore: And after the said writ or writs be returned, . . . the Justices there shall assign to the same poor person or

8. That historic duty was a principle basis for organizing the integrated bar. In the case which recognized the integration of the bar, *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949), Justice Terrel, writing for the Florida Supreme Court, gave the definition of the integrated bar:

The integrated bar has also been defined as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obligated to bear his portion of the responsibility.

40 So.2d at 904.

persons, counsel learned, by their discretions, which shall give their Counsels, nothing taking for the same: And likewise the Justices shall appoint Attorney . . . for the same poor person . . . , and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same

Statutes of Henry VII, 1495, 11 Hen. 7, c.12, Volume III, Florida Statutes 1941, Pages 51 & 52.⁹

This statute was effective on July 4, 1776 and therefore is a part of the law of Florida. Shortly after Florida became a state, "Thompson's Digest" compiled British statutes in force in Florida and explicitly recognized 11 Hen. 7, c.12 as a part of Florida's laws. Almost a century later, the statute was reconsidered and again accepted as in force, "Useful and Helpful Matter," Volume III, Florida Statutes 1941.¹⁰

The provision of legal services to all citizens was, therefore, a part of the law of England for centuries and consequently is a part of the law of Florida and other states as well. Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loy. L.A.L. Rev. 341 (1985).¹¹

The statute provides a rather complete set of rights. The poor have rights to writs under seal, to help in filling out writs, to "counsel learned" and to attorneys, all without cost.¹²

9. The preamble of this statute is also interesting:

Pray on the Commons in this present Parliament assembled. That where the King our sovereign lord, of his most gracious disposition, willeth and intendeth indifferent justice to be had and ministered according to his Common laws, to all his true subjects, as well to the poor as rich, which poor subjects be not of ability the power to sue according to the laws of this land for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritances, as other causes; For remedy whereof, in the behalf of the poor persons of this land, not able to sue for their remedy, after the course of the common law; be it ordained and enacted by your highness and by the lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by authority of the same.

10. The introduction and annotations of Guy W. Botts to this volume indicate that the only statutes passed by the Florida Legislature that are relevant to 11 Hen. 7, c.12 are consistent with it. Volume III, Florida Statutes 1941, pages 51 and 52.

11. This excellent article is the source of a great deal of information. Judge Earl Johnson, an appellate judge in California, points out that legal services for the poor are provided not only in modern England but in virtually all other European countries. Moreover, legal services for the poor have been ordered by the European Court of Human Rights. See *Airey Case*, 32 Eur. Ct. H.R. 12 (Ser. A) (1979).

12. At first glance, *Mallard v. U.S. District Court for the Southern District of Iowa*, 57 U.S.L.W. 4487 (U.S. May 1, 1989), may suggest that the courts lack power to appoint counsel outside of the criminal context. However, the court rested its decision on the language of the relevant statute, 28 U.S.C. § 1915(d), which says that the federal courts may "request" an attor-

C. The 1495 Statute is Buttressed by Florida's Constitution.

This law, effective in Florida, is consistent with the role this Court has played in modern times and is consistent with the recognized traditions of the bench and bar. It is also consistent with provisions of the Constitution of Florida which grant broad rights to citizens and provide essential powers to this Court.

The rights of all citizens to justice are stated in Article I, Section 21, Constitution of Florida in this way:

Access to Courts. The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

This right to justice for every person is consistent with other rights guaranteed in the Constitution of Florida including the "Equal Rights" and "Basic Rights" provisions of Article I, Section 2 and the Due Process provision of Article I, Section 9.

The power of the courts to develop a procedure to implement these rights lies in the inherent power of the courts and the explicit authority of Article V, Section 2 (providing for rule making authority and the supervisory authority over all courts) and Article V, Section 15 which gives the Supreme Court jurisdiction over the legal profession.

It is appropriate, therefore, for this Court to again take up the problem of legal services to the poor and to provide a system of administration for the rights conferred by the statute of Henry VII, the Constitution and the laws of Florida.

D. Modern Conditions Require A System for Administration to Insure the Effective Right of Counsel.

In the days of Henry VII, law was much less pervasive in the lives of citizens, less complicated and more easily administered.

The statute of Henry VII provided that counsel and attorneys would be provided to the poor by appointment of the judges. In those days, judges had no difficulty in matching the poor with lawyers. The entire system of justice was built on a system of writs (compared with elaborate statutes, administrative regulations, etc., of our day) and the lawyers actually traveled with the royal justices who "rode cir-

ney to represent a poor person. The language in 11 Hen. 7, c.12 differs greatly and says "justices shall appoint." Also, the United States Supreme Court recently decided a bar admission case for the Virgin Islands invalidating a restriction on non-residents. That case reviewed and commented on a rule of court which required public service of all bar members. *Barnard v. Thorstenn*, 57 U.S.L.W. 4316 (U.S. Mar. 6, 1989).

cuit". It was a simple task to pick out a lawyer and match the lawyer with the poor person needing assistance.

Even in relatively modern times, the problem of matching lawyers with needy clients was not so complicated. In relatively small communities, lawyers performed legal services for the poor because it was seen as a community necessity or because a judge requested that the services be provided.

Today, much of Florida's population lives in cities, and the sense of community has eroded. There are not many lawyers who live or work in the poor communities of Florida. Urban lawyers working in high rise buildings are not accessible to the poor. In reality, if a law firm opened its reception room to poor clients from the vast metropolitan populations, it would quickly be confronted with overwhelming work and would shoulder a disproportionate share of the burden.

Today, a system for matching the lawyer with the poor client is necessary and this system should be developed by the courts. *See* Art. V, §§ 2 & 15, Fla. Const.

The decline in the sense of community means that law has grown in importance. Less and less we are bound by a common heritage, a common religion, a shared history or common language. Law is a powerful cohesive force.

The pledge we recite from our earliest school days and which we repeat in unison at most of our public meetings ends with the phrase "with liberty and justice for all." It is that ideal which serves as a powerful principle of unity in this country. The responsibility for realizing these ideals is placed by society on the courts and the legal profession. There is reason for the bar and the bench to be proud of what has been done in the last quarter of a century. *Gideon v. Wainwright* and its progeny recognized that everyone threatened with loss of liberty is entitled to counsel.

The law does more than punish and the ideal of justice for all is not only for those who are accused of trespass. It is also for those who have needs which can be provided for only by our legal system. By making available full access to justice, this Court and the bar fulfill their traditional role and overcome citizens' alienation and distrust.

While all citizens pledge ourselves to liberty and justice for all, it is the lawyers who "profess" a special commitment to equal justice for all. This Court and the Florida Bar have provided national leadership to fulfill this commitment. The procedure suggested here allows the Court and the bar to continue with this leadership role.

IV. ACTION BY THE COURTS AND THE BAR DEMONSTRATES THAT ACCESS TO JUSTICE IS NOT BEYOND OUR REACH

At every stage in the development of the right to counsel, the question of economic impact has been properly raised. In the slow but

steady march toward a more just system, as the courts stepped from requiring counsel in capital cases, *Powell v. Alabama* (1932),¹³ to felony cases, *Gideon v. Wainwright* (1963),¹⁴ to juvenile cases where confinement was possible, *In re Gault* (1967),¹⁵ and finally to misdemeanors where imprisonment could be imposed, *Argersinger v. Hamlin* (1972),¹⁶ the skeptics have often said that we could not afford justice.

Those warnings have turned out in retrospect to be wrong, and we can now read those decisions with some sense of amusement. What so frightened the timid is commonplace now. Indeed, our sense of justice has been reshaped. Today, most lawyers abhor the idea of a system of justice which does not provide counsel for indigent criminal defendants.

This is not to suggest that court decisions addressing the right to counsel have ignored the realities of economics. The approach taken by the Florida Supreme Court in provision of counsel for certain juvenile proceedings, *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980), demonstrates a careful approach which blends the traditions of lawyer public service with the realities of lawyer overhead. Similarly, the Rules Regulating The Florida Bar, Rule 6-4.2, allows lawyers to refuse appointments which are burdensome, contrary to law, or distasteful.

This Petition does not suggest a sweeping rule to grant counsel to all poor litigants in all cases. Rather, the proposal seeks to have the courts and the bar review available procedures and determine which of those are so complicated as to require counsel for effective representation. In some areas, this can be done on a case-by-case basis, using the approach suggested by *In Interest of D.B.*.

Where the courts and the bar find that the procedure is complicated, there may be ways to reform the procedure, simplify the structure, or provide paralegal aid which makes access available to everyone. Only where the interests of justice require a complexity of procedure which only lawyers can handle will there be a necessity for appointments, a wider system of legal aid, or devices to match appointed lawyers with needy clients.

In many places, the bar will have already made provisions for legal access. In many smaller communities, the local traditions of the bench and bar have, for many years, avoided the problem. In some larger communities, very active legal aid programs have had support from the bar and, in recent years, some large volunteer bar associations

13. 287 U.S. 45.

14. 372 U.S. 335.

15. 387 U.S. 1.

16. 407 U.S. 25.

have required legal services to the poor as a condition of membership. The Tallahassee Bar and the Orange County Bar have led the way and have been joined by the Florida Academy of Trial Lawyers and the Palm Beach Bar Association.

The provision of IOTA funds will also reduce the scale of the problem and, in any event, the cost may not be as great as we might speculate. Once this is broken down by circuits, the actual provision of resources is not beyond our reach. Legal access to the poor is an achievable goal.

In other states, there may be greater problems. But, thanks to the efforts over many years, access to lawyers and dispute resolution is more available in Florida than in many other states. It may help to look at particular circuits. The Eleventh and Thirteenth Circuits are both good examples.

A. The Eleventh Circuit

Those who cannot afford attorneys have access to the Small Claims jurisdiction of the County Court. In the Eleventh Circuit, the bar and the court have attempted to facilitate that access through public information programs including a videotape explaining court procedures for landlord and tenant matters.

There are also extensive mediation programs and alternative dispute resolution facilities in place. These programs have been promoted through an innovative technique—the court has arranged mediation training for qualified persons who, in return, agree to provide mediation services to those who cannot afford to pay.¹⁷

Representation of the interests of juvenile dependency proceedings is handled by an extensive network of volunteers in the Guardian Ad Litem program, and the court has developed an extensive program to provide appointed counsel in guardianships through cooperation with the probate bar. In this latter program, lawyers agree to waive their fees in appointed cases. In consideration of this waiver, the county donates a sizable fund used to support the administration of the program.

The principal offices for legal services operate through the Legal Services of Greater Miami and the Dade County Bar Legal Aid program. Legal Services is funded through federal funds and the IOTA

17. The Eleventh Circuit has also used this incentive to recruit volunteer attorneys for the backlog of appellate cases in the Public Defender's office, providing CLE programs on appellate practice to attorneys who agree to handle appeals. Over 250 appeals have been undertaken by this group of lawyers. A similar program was conducted by the Junior Bar of Dade County over twenty years ago.

money granted through the Florida Bar Foundation. Legal Aid, however, does not receive these funds and instead relies on the allocation of a portion of the filing fees, a program arranged by Chief Judge Gerald Wetherington.

When all of this is considered together, it is apparent that the Eleventh Judicial Circuit is already well on its way to developing a plan for the provision of legal services. The adoption of this rule will provide a basis for reviewing the entire system and will allow the process of cooperation between the bench and the bar to continue at a local level.

B. The Thirteenth Circuit

The Thirteenth Judicial Circuit provides another very useful illustration. In the last year, the Hillsborough County Bar Association (with other local bar associations) has implemented an "Annual Plan for the Involvement of Private Attorneys in the Provision of Legal Assistance to Eligible Clients."

Under the leadership of its President, Don Gifford, the Hillsborough County Bar Association also proposed an increase in the filing fees to achieve an increased and flexible funding source.¹⁸ Under this proposal, the Legal Aid and Bay Area Legal Services programs received over \$615,000 annually from filing fees. Chief Judge F. Dennis Alvarez approved this proposal and the Hillsborough County Commission adopted an implementing ordinance.

This effort to develop *pro bono* programs coupled with efforts to expand financial support for legal service programs is exactly what is contemplated by the proposed rules, and the cooperation between the bench and the bar in the Thirteenth Circuit is an example to others.

The development of the local plan under the suggested rule will provide an opportunity for the bench and the bar to communicate broadly on the subject of access to justice, and, through review by this Court, some of the more innovative local programs can be suggested for adoption by other circuits.

Florida judges and lawyers have taken many steps to provide access. This proposal is one more step.

V. NATURE OF RELIEF SOUGHT

We request that the Court consider adopting rules to assure the right to counsel for the poor which is provided by the Statute of

18. Documents relating to the initiatives in the Thirteenth Circuit have been lodged with the Clerk of the Court.

Henry VII (11 Hen. 7, c.12), the Rights of Access, Due Process, and Equal Protection guaranteed by the Constitution of Florida.

As a point of beginning, we ask that the Court consider an amendment to the Rules Regulating the Florida Bar and one to the Rules of Judicial Administration.

A. This Petition Proposes an Amendment of the Rules Regulating The Florida Bar to Include Rule 1-3.1(a).

Rule 1-3.1(a) Duties. It is the duty of every member of The Florida Bar to provide aid to indigents as and when ordered by the courts, including orders issued pursuant to Rule 2.065 of the Florida Rules of Judicial Administration.

Comment: This rule parallels the rule on "Public Service" which requires that lawyers shall not, without cause, turn down an appointment, Rule 6-4.2 of the Rules Regulating The Florida Bar. This rule will act as a plain statement of the affirmative duty which has been the historic obligation of lawyers expressly recognized by the Florida Supreme Court, *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980). This rule does not contemplate that the appointment power ever be used to coerce lawyers who have principled objections to particular representation. Rule 6-4.2 already protects lawyers against burdensome appointments and against representation of clients or causes repugnant to them. Common sense dictates that the unwilling lawyer not be appointed.

B. This Petition Also Proposes Rule 2.065, as Suggested Below, Be Amended to the Rules of Judicial Administration.

Rule 2.065. Legal Assistance to the Poor.

(a) Statement of Purpose.

The purpose of this rule is to establish a procedure by which legal needs of the poor in Florida may be determined and satisfied at the circuit level. This rule implements the rights to justice set forth in 11 Hen. 7, c.12, as adopted by Section 2.01, Florida Statutes, the power of judicial assignment as prescribed by Rule 4-6.2 of the Code of Professional Responsibility, and the rights to Access to the Courts, Due Process, and Equal Rights guaranteed by the Constitution of Florida. It provides a procedure for all Florida judges to assign attorneys in appropriate cases.

(b) Duties of Chief Judges.

(1) *Requests for Aid.* In each circuit, petitions or other such requests for legal services may be given to the chief judge. Requests may come from any interested party, including legal services

organizations, the local bar, or individuals.

(2) *Responses*. In response to such requests, the chief judge may: (i) assign an attorney or attorneys to handle a given request; (ii) delegate to other judges in the circuit responsibility for receiving and effectuating the requests; (iii) appoint a legal needs commission to handle creation of procedures for receiving and acting upon requests or (iv) create any other procedure for the effective handling of requests for legal aid.

(c) *Plan for Meeting Legal Needs*.

(1) *The Plan*. Each plan will include the processes for funding legal services, selecting meritorious cases, appointing counsel, and enforcing the plan.

(2) *The Commission*. Should the chief judge appoint a legal needs commission, the commission shall have the power to devise and effectuate a plan for meeting the community's legal needs. The commission may include attorneys, judges, and other citizens. The commission shall hear from all interested parties and may receive submissions from lawyers, law firms, and legal service organizations.

(d) *Ratification*

The procedure and resulting plan chosen by the chief judge will be filed by the chief judge with the Supreme Court of Florida.

(e) *Petition to Amend or Revoke Plan*.

Where conditions are shown to justify an amendment or revocation of the plan, the chief judge shall entertain a petition to amend or revoke using the procedure described in Subsection (b)(1).

Comment: The Supreme Court has recognized that it is the court's "responsibility to promote the full availability of legal services," *The Florida Bar v. Furman*, 376 So.2d 378, 382 (Fla. 1979). This rule provides a simple procedure allowing the courts and lawyers to meet the legal needs of the poor. It contemplates a program worked out locally to meet local needs and with local administration under the general policy direction of the Supreme Court. *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980).

VI. CONCLUSION

To an alien observer, it may seem strange that any system of government gives one of the three branches—its courts—control over a single profession and acquiesces in the assertion of judicial supremacy. Yet, this concept is at the very heart of our constitutional system. Moreover, the system requires the courts, not the legislative or executive branches, to oversee the law profession.¹⁹

19. In 1980, then Chief Justice Arthur England presented a paper which looked at a hypo-

This arrangement has been subject to periodic attacks but has persisted because it has been a system which has the broad public interest as its principal concern. The special status of the legal profession is earned in large part because lawyers have been diligent in assuring equal justice for all citizens.

The right of access to justice for all persons is an obligation of society and lawyers have a special role which is properly directed by the courts.

We propose adoption of a flexible rule allowing the courts to determine whether access to justice is being denied because legal needs exist in a given community and, if so, provide a procedure for the orderly development of a plan tailored to meet the local needs.

This Petition recognizes that the methods of providing for those needs should be developed locally, combining as appropriate the resources of the bar, legal services organizations, paraprofessionals, court filing fees, assessments by the voluntary bar, appointment of counsel by the court or any other of a variety of solutions.

Given the proud traditions of the bar and the courts, we²⁰ submit that this proposal will appropriately focus the problem and place its solution into the hands of local lawyers and judges.

thetical future proceeding to "deintegrate" The Florida Bar. His "opinion" on this subject, dated July 1, 1998, appears as a "*A Visionary Opinion*", 4 Nova L.R. 343 (Spring 1980). It treats the core issues of legal services and the responsibility of the bar to meet those needs of the public which are defined as legal needs.

20. The Petition was submitted to the court on behalf of the following members of the Florida Bar: William H. Abbuehl, Jacqueline Allee, W. George Allen, Catherine A. Altman, Martha W. Barnett, Randall C. Berg, Kimberly E. Brautigam, W. Peter Burns, Dominic M. Caparello, Marshall R. Cassidy, Neil Chonin, Julian Clarkson, LeRoy Collins, Doreen Cook-Wesley, Marcia K. Cypen, Talbot D'Alemberte, Paul C. Doyle, C. James Dulfer, Arthur J. England, Jr., Sheila Essig, Matthew P. Farmer, Donald A. Gifford, Steven Goldstein, Robert H. Graddy, Mark K. Hadyu, Treena A. Kaye, Judith E. Koons, Ira J. Kurzban, Rose Levering, David Lillesand, Robert E. Livingston, Hugh Macmillan, Jr., Scott T. Manion, Donald M. Middlebrooks, Chandler R. Muller, Travis M. Murphy, Cyra C. O'Daniel, Roderick N. Petrey, Robert J. Pleus, Jr., F. Wallace Pope, Jr., Mary Delaney Raspet, James C. Rinnaman, Jr., James M. Russ, Frank Scruggs, Steven L. Seliger, Samuel E. Sharper, Jr., William J. Shepard, Glenn A. Shuman, Chesterfield Smith, John Edward Smith, William Reece Smith, Jr., Kent R. Spuhler, Alan C. Sundberg, Parker D. Thomson, Steven J. Uhlfelder, Sylvia H. Walbot, and Elizabeth L. White.